IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted] 29

U. S. BULK CARRIERS, INC.,

Petitioner,

v.

DOMINIC B. ARGUELLES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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Opinion Below

The opinion of the Fourth Circuit Court of Appeals (pp. 57a-72a) [1] is reported at 408 F.2d 1965.

Jurisdiction

The judgment of the Court of Appeals was entered April 4, 1969 (p. 73a). The Petition for Writ of Certiorari was filed on June 26, 1969, and was granted June 15, 1970. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

[1] The designation "a" refers to the pages of the Single Appendix.

Questions Presented

1. Is a merchant seaman required to invoke and submit to the grievance and arbitration procedures as provided for in the Collective Bargaining Agreement between his employer and his union with respect to disputes arising out of the general terms and provisions of said agreement?

2. In view of the procedures set forth in the Collective Bargaining Agreement, designed and intended to supply a basis for the resolution of contract disputes, was adequate recourse available to the respondent for the purpose of resolving his claims for overtime earnings and penalties for alleged restriction to ship, which said overtime and penalties were, in the first instance, based on the terms and provisions of said contract?

3. Notwithstanding the pendency of the statute of the United States, Title 46 U.S.C. § 596,[2] which afforded re-

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[2] In the complaint filed by respondent for purpose of instituting his suit in the United States District Court, he based his right to proceed against the petitioner therein on this statute which provides:

> "The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before

spondent the right to resort to litigation to assert his claims for overtime earnings, was it incumbent upon him to affirmatively pursue the grievance and arbitration procedures in the Collective Bargaining Agreement before invoking the statutory relief? Or, was it mandatory that said statute be applied for the resolution of respondent's overtime earnings claim despite the existence of the contract, which, from its inception, was intended to provide the machinery for the settlement of such disputes?

4. In the limited context of the respondent's claim for overtime wages as presented in this case, is he in need of the special protected status generally afforded to American merchant seamen in the courts of the United States when a valid Collective Bargaining Agreement has been negotiated in his behalf by his union, which contract was intended to protect him while employed aboard petitioner's ship and intended to resolve disputes that might arise as a result of said employment?

5. Should the United States Court of Appeals for the Fourth Circuit have abstained from ruling that respondent may pursue the relief provided for in Title 46 U.S.C., Section 596, in view of respondent's admitted refusal to utilize the grievance procedure established by the Collective Bargaining Agreement, and in absence of an affirmative showing that the respondent was refused assistance by his union in effecting a settlement of his dispute relating to overtime wages arising while employed aboard petitioner's vessel?

6. Did the United States Court of Appeals for the Fourth Circuit err in reversing the summary judgment as initially granted in favor of the petitioner in the United States District Court for the District of Maryland?

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the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts."

Statutes Involved

An Act of Congress, March 4, 1915, C. 153, Sec. 3, 38 Stat. 1164, Title 46 U.S.C. § 596,[3] and Labor Management Relations Act, June 23, 1947, C. 120, Title II, § 203 (d) 61 Stat. 153 and C. 120, Title III, § 301(a) 61 Stat. 156, Title 29 U.S.C. § 173(d) and 185(a).[4]

Statement

The respondent was employed by petitioner for service as an Ordinary Seaman aboard SS *Pecos* at Galveston, Texas, on August 3, 1965 (p. 9a-p. 10a). Prior to said employment he became a member of the National Maritime Union. He continued to enjoy that status during the time he served aboard said vessel and subsequent thereto. His work for petitioner was subject to the terms and provisions of the Collective Bargaining Agreement (p. 41a-p. 52a)[5] in force at the time. Said agreement contained explicit provisions for use in the resolution of various disputes, including, but not limited to, the problems that were in issue in the suit instituted by the respondent against the petitioner in the U. S. District Court for the District of Maryland.

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[3] 46 U.S.C. § 596 is quoted in full as footnote No. 2, *supra*, page 2.

[4] 29 U.S.C. § 173(d) is quoted in full as footnote No. 21, *infra*, p. 17. 29 U.S.C. § 185(a) is quoted in full as footnote No. 23, *infra*, p. 20.

[5] The Collective Bargaining Agreement was marked Joint Exhibit No. 1 in evidence before U. S. District Judge Harvey, at the time of the argument and motion for Summary Judgment in the U. S. District Court for the District of Maryland at Baltimore on April 26, 1967, and the relevant excerpts of said joint exhibit have been reproduced as part of the single appendix at pages 41a-52a.

At the time respondent became the employee of the petitioner, he signed Shipping Articles, in the usual form, at Galveston, Texas. The Articles provided for employment aboard *SS Pecos* for a period of six calendar months at the agreed monthly base wage of $304.00, (p. 41a)[6] overtime to be paid when due at the rate of $1.89 per hour (p. 33a-attachment 11).

Six months later, on February 3, 1966, petitioner's vessel, with respondent on board, serving in his appointed capacity as ordinary seaman, arrived at Cape St. Jacques, South Vietnam. Due to local conditions, the vessel was required to enter an anchorage at the Cape and await official clearance to proceed up river and enter the port of Saigon. Pratique, quarantine clearance, was not granted until February 13, 1966 (p. 28a-p. 29a) at which time the vessel was cleared to proceed, a trip of seven hours' duration (p. 33a-attachment 5), to reach a berth preparatory to the discharge of cargo at Saigon. The pratique and clearance procedures were within the exclusive purview of the South Vietnamese port authorities, and until such time as the vessel was given official clearance, it was considered as being at sea.

On February 13, 1966, at 1530 hours, after pratique was granted and the vessel received its official clearance for entry into the port, sea watches for the crew were terminated. The men not assigned to routine port duties aboard the ship were relieved from duty. Thereafter, at 2000 hours on February 15, 1966, cargo discharge was begun (p. 33a-attachment 7). On February 17, 1966, the respondent, in company with other crew members, attended at the office of the U. S. Consular official in the port of Saigon for the purpose of terminating his employment with

[6] A stipulation relating to the Shipping Articles covering plaintiff's voyage aboard *SS Pecos* was entered into, by and between counsel for the parties herein and included in the single appendix at p. 40a, p. 41a.

the petitioner, and as incident thereto, they "signed off" Shipping Articles. Respondent's wage account was confirmed by means of individual payroll voucher (p. 33a-attachment 11) and he, in company with the other men leaving the ship, was provided air transportation and a cash advance of $50.00 for the return to the United States. The use of the payroll voucher was a customary and accepted procedure for American merchant seamen terminating their employment in a foreign port and was approved by the local Consular official acting in place of, and instead of, a United States Shipping Commissioner.[7]

At the time respondent obtained employment aboard *SS Pecos,* he signed Shipping Articles for a six month engagement, effective August 3, 1965. The Articles called for a final port or place of discharge in the continental United States (p. 40a). On February 3, 1966, the end of the six months term as specified for the length of the voyage, the ship was "at sea" in the anchorage at Cape St. Jacques, awaiting official clearance to enter the port of Saigon. The cargo then in the vessel had been loaded prior to February 3, 1966, and the Articles were, in effect, extended with respect to the respondent until the said cargo was completely discharged.[8] That discharge was completed at Saigon on February 18, 1966.

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[7] The functions of a Consular Officer acting in place of a United States Shipping Commissioner in foreign ports has been discussed by Mr. Martin Norris in *The Law of Seamen,* Third Edition, Vol. I, Section 30, *et seq.*

[8] Norris, *Law of Seamen, ibid,* Section 116, p. 168:

> "A final port of discharge is the last port of delivery where either cargo or ballast is discharged, or where some other act is done which has the effect of terminating the voyage there. It is that port at which the vessel is completely relieved of her cargo and becomes ready for another venture."

The payoff procedure utilized before the U.S. Consular official, whereby the respondent was provided with a payroll voucher calling for payment of sum recited therein, in United States dollars, upon presentation of the voucher at the office of the petitioner or its agent in the port of initial engagement in the United States, was effected before the completion of the discharge of the vessel's cargo. That procedure complied with Title 46 U.S.C. § 596 and Article I, § 39 of the Collective Bargaining Agreement (p. 42a). On the day of the termination of the respondent's employment at Saigon, he and several other seamen missed the plane because they had apparently engaged in a dispute with the Consul over the manner of the payoff. However, the Consul acting in conformity with the dictates of Title 22 CFR, Chapter I, § 83.2,[9] declined to "inject" himself beyond the scope of his authority and dispatched the respondent in company with his fellow seamen to the United States by means of the air transportation provided by the petitioner. Upon his arrival, the respondent proceeded to Galveston, Texas, where he presented his payroll voucher to petitioner's local agent on February 22, 1966, and received the sum as therein stated.

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[9] Title 22, C.F.R., Chapter I, Section 83.2: Seamen's rights under collective bargaining.

> "In practice, the seamen's right to complain is extended to almost any incident aboard ship. However, when seamen approach a foreign service office, with complaints concerning failure of the Master, or ship's agent to extend them benefits in such matters as lodging, repatriation, food allowances, and the like, the seaman may be informed that consular officers are authorized to protect seamen's rights under the statutes, but are not authorized to inject themselves into disputes between the parties signatory to the Collective Bargaining Agreement. Moreover, most of these agreements contain provisions for settlement of disputes upon completion of the voyage. Both operators and unions prefer to use machinery established at the domestic ports for this purpose."

Shortly after receiving his money, as called for in the voucher, respondent alleges that he visited the National Maritime Union representative at Galveston. He discussed his claims for additional overtime earnings and was instructed to write to the union port agent at Yokohama, Japan. It was explained that the representative at Yokohama had local jurisdiction over union matters arising in the Far East and was in the best position to look into the problem. Admittedly, respondent did not write to Yokohama. Instead, he traveled to Baltimore and employed an attorney to represent his interest. It is undisputed that no steps were taken by the respondent or his counsel under the grievance procedure of the Collective Bargaining Agreement in an effort to resolve the disputed overtime claims. Instead, the attorney instituted suit by filing a complaint (p. 2a) on or about November 7, 1966.

In the complaint, filed in the U.S. District Court for the District of Maryland, incident to the said lawsuit, respondent claimed:

> (1.) "A sum representing the difference between the cost of a ticket for first class air travel from Saigon to Galveston provided by U.S. Bulk Carriers and the cost of less expensive air transport accomodation actually provided, plus an excess baggage charge of $8.50 from Los Angeles to Houston and shared limousine expense of $6.50 from Houston to Galveston." (p. 60a)[10]

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[10] During the pendency of the District Court action, plaintiff was advised to communicate with the air carrier and he obtained an adjustment of the difference between first-class air transportation from Saigon to Galveston as paid for in his behalf by petitioner and the tourist class accommodations actually provided by the air line. The expense item for excess baggage in the amount of $8.50 and limousine cost in the amount of $6.50 were covered by $50 in cash for miscellaneous travel expense provided respondent by master of *SS Pecos* at Saigon. Thus, the only remaining controversy relates to the claims for overtime compensation and penalties.

(2.) "Balance of claimed overtime earnings of which $59.50 was allegedly attributable to overtime work claimed to have been performed on the vessel prior to February 3, 1966, and $88.00 of claimed overtime compensation because he was unjustifiably restricted to the vessel for eleven days in South Vietnam." (p. 60a)

(3.) "Statutory penalty of $254.95 on account of claimed delay in payment of wages calculated on the basis of two days' pay for each day from February 3, 1966, to February 22, 1966, less the first four days, or for a net period of fifteen days." (pp. 60a-61a)

Respondent does not claim that there was an improper deduction or withholding of sums earned as such, but asserts that he worked a greater number of overtime hours than had been authorized for payment by his superiors aboard ship.[11] The respondent's claim for overtime wages because of restriction to ship, delayed payoff and work performed aboard ship are all matters which are provided for in the Collective Bargaining Agreement and the basis for determining the amounts of money, if any, due on account of said items are provided for in that contract (pp. 42a-48a). In the same contract it is provided that any disputes arising in connection with any matters contained in the Collective Bargaining Agreement are to be resolved in accordance with Article II "Grievances" §§ 1, 2 and 3 (pp. 42a-44a). It is further provided that such matters may be submitted to arbitration, Article XII, §§ 1, 2 and 3 (pp. 49a-52a) if a satisfactory adjustment cannot be effected by means of the grievance procedure.

Issue was joined by the service of petitioner's answer (pp. 5a-7a) in the aforesaid lawsuit. Thereafter, petitioner filed a motion for summary judgment with supporting

[11] Thus differentiating the issues in this case from the type dealt with by the Court in *Johnson* v. *Isbrandtsen Co., Inc.*, 343 U.S. 779 72 S.Ct. 1011, 96 L. Ed. 1294.

papers (pp. 22a-33a). Respondent filed answering papers (pp. 34a-39a) and the matter was set down for argument on April 26, 1967. After hearing the arguments of counsel and considering the various materials, including briefs, submitted by both sides, the District Court granted petitioner's motion for summary judgment and entered an appropriate order (pp. 55a-56a). The District Court's ruling (p. 55a) was not based on the merits of the overtime wage dispute, but indicated that respondent's claims should have been submitted for resolution by means of the procedures called for in the Collective Bargaining Agreement.

Respondent appealed the District Court Ruling to the United States Circuit Court of Appeals for the Fourth Circuit (p. 56a). The argument of the appeal took place at Richmond, Virginia, on January 12, 1968, and the decision and judgment of the Circuit Court was filed on April 4, 1969 (pp. 57a-73a), reversing the order of the District Court. The ruling of the Court of Appeals was made on the basis of a divided decision; two Circuit Judges favoring the respondent's position and one Circuit Judge favoring the petitioner's cause in a dissenting opinion. The matter is now here for review on Writ of Certiorari.

Summary of Argument

The respondent's claim for overtime compensation was based on those parts of the Collective Bargaining Agreement which provided for such payment in the appropriate situation. At the end of respondent's employment aboard *SS Pecos* he was paid his base wages and overtime compensation admitted to be due. His demand for additional overtime was rejected by the petitioner. The same agreement contained provisions establishing grievance machinery and arbitration procedures designed to settle such disputes. Admittedly, the respondent did not make use

of those procedures. Instead, he commenced a lawsuit in the U.S. District Court in Maryland claiming the disputed overtime compensation, plus statutory penalties in accordance with the provisions of 46 U.S.C. 596. It is petitioner's position that respondent was required to utilize the grievance machinery, set forth in the N.M.U. contract, which governed the terms of his employment.

Since the enactment of the Labor-Management Relations Act, 1947,[12] the Court has ruled that a body of federal labor contract law has developed and is designed to be applied in the resolution of disputes arising during the pendency of a Collective Bargaining Agreement. The relevant decisions of this court have expressed the national labor policy as favoring the settlement of differences by means of the grievance arbitration procedures created by the union contract, in lieu of litigation. In utilizing arbitration, considerable time and expense is saved by the parties and the problems are settled by persons with knowledge of the workings of the industry. They are best equipped to arrive at practical, workable solutions. Thus, in effect a "common law of the contract"[13] has evolved. The Court has given impetus to that development in a number of decisions beginning with the case of *The Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 1 L. Ed. 2d 972, 77 S.Ct. 912 (1957) through the most recent ruling in *The Boys Market* v. *The Retail Clerk's Union, et al.,* — U.S. —, 26 L. Ed. 2d 199, 90 S.Ct. — (1970).

At the time of the consideration of this case in the court below, it was apparent, on the basis of the majority opinion, that a reluctance was felt to extend the general labor contract law precepts to the same degree with respect

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[12] Act of June 23, 1947, C. 120, Sec. 1, 61 Stat. 136, 29 U.S. C. 141, *et seq.*

[13] *United Steelworkers of America* v. *Warrior & Gulf Navigation Company,* 363 U.S. 574, 80 S.Ct. 1347, 4 L. Ed. 2d 1409.

to a merchant seaman's overtime compensation claim as had been applied in the case of his shoreside counterpart. The older statute embodied in 46 U.S.C. § 596 was considered more important than the "common law of the contract". It was suggested that the special protection afforded seamen as wards of the Admiralty forbids such a development. That ruling does not recognize the nature of the maritime industry in its modern posture, and fails to grant to the seaman of today the status of a mature individual. Most of the considerations for the special protected status are no longer valid. The N.M.U. Collective Bargaining Agreement was the result of many years of bargaining, repeated strikes, and successive contracts. That union has powerful, vigorous leadership and is a modern, sophisticated labor organization. It is most able to protect the rights of its members at every turn. The "considerations of public policy" referred to by the court below will be best served by the uniform application of the labor laws of the United States to all of labor without exception.

The U. S. District Court was correct in granting summary judgment in this case because the undisputed facts establish that the respondent did not utilize the grievance machinery in the applicable labor contract. This court has ruled in its decisions in *Republic Steel Corporation* v. *Charlie Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed. 2d 580 (1965) and in *Manuel Vaca, et al.* v. *Niles Sipes, et al.*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed. 2d 842 (1967) that the aggrieved employee must in the first instance, proceed in accordance with the procedures specified in the union agreement for the purpose of resolving disputes arising out of the contract provisions. That failure paved the way for the summary judgment. Such action by the District Court did not divest it of jurisdiction, but was in effect a valid exercise of jurisdiction by abstaining from a determination on the merits in order to allow

the parties to settle their dispute, as they had agreed to do, by contract. The use of the contract grievance arbitration procedures provides a means for prompt definitive economical and adequate relief, all in the furtherance of the expressed policy of the United States Congress and the courts in their decisions relating to the subject.

ARGUMENT

POINT I

The dictates of congressional policy, as embodied in the Labor-Management Relations Act, 1947, require the utilization of the grievance and arbitration procedures as provided for in the National Maritime Union Collective Bargaining Agreement for the resolution of the overtime compensation dispute in this case.

Prior to the dates of the several occurrences which are relevant to the pending litigation, the petitioner entered into an agreement [14] with the National Maritime Union of America, an affiliate of the AFL-CIO, wherein said union was recognized as the sole collective bargaining agent and representative of the unlicensed personnel employed aboard vessels operated by the petitioner. The respondent's employment as an ordinary seaman, aboard *SS Pecos* was as a member of the N.M.U. and his employment was covered by the terms and conditions of that contract.

The respondent's claims concern themselves with his alleged entitlement to 88 hours of overtime compensation because of his so-called restriction to ship from February 3, 1966, to February 13, 1966, and 59 hours of overtime

[14] Joint Exhibit No. 1 relevant portions of which are contained in the single appendix (pp. 41a-52a).

compensation for the performance of certain other duties during the course of his employment aboard *SS Pecos*, as set forth in his overtime claim itemization.[15] Petitioner avers that the restriction to ship was the result of failure of the South Vietnam port officials to grant pratique and quarantine clearance, thus no overtime pay was required to be paid in accordance with Article III, § 1(c) and § 2 (pp. 44a-45a). It is further averred that the 59 hours of alleged overtime work was without the prior authority of the Master or person acting by authority of the Master and was not work for which overtime pay was justified, Article IV, § 2 (p. 46a).

At the time the respondent terminated his employment at Saigon, his pay voucher reflected the payment of his base wages and undisputed overtime compensation (p. 33a, attachment 11). On the basis of that voucher, it is evident that the plaintiff received his earnings through February 17, 1966, that being the same day that he appeared before the U.S. Consul at Saigon and received clearance for the termination of his employment aboard *SS Pecos*.

Article II, § 1 and § 2 (pp. 42a-43a) and Article IV, § 1 through § 10 (pp. 46a-49a) of the Collective Bargaining Agreement as referred to in part above, set forth the terms and conditions under which the respondent is entitled to receive overtime, if any, whether due because of restriction to ship or for work performed during the voyage. The rate of such pay, the authorization for same, and the time for such payment are also provided for in relevant sections of the union contract. The petitioner's rejection of the respondent's claim created a dispute over the interpretation of the provisions of the agreement within the scope of Article XII, Section 1 of the contract (p. 49a). Prior

[15] Respondent's overtime claim itemization as prepared in his own handwriting was marked defendant's exhibit No. 1 during the course of his pre-trial deposition and has been set forth in the single appendix (p. 21a).

to the submission of such a dispute to arbitration, it is provided in Article II, § 1 and § 2 that certain preliminary steps are required in an effort to have an expeditious resolution of the dispute, complaint, or disagreement without the utilization of the more formal procedures set forth in Article XII.[16]

While the respondent made no effort to refer his claim to the marine personnel division of the petitioner after his departure from *SS Pecos* at Saigon, he apparently discussed the situation with the union agent in Galveston, Texas, and was informed that he should write a letter to the union representative at Yokohama, Japan. The representative in Yokohama had the responsibility for matters arising in the geographical area in which the respondent terminated his employment with the petitioner. Instead of adopting the recommended procedure, the respondent returned to Baltimore and in due course engaged counsel. Neither respondent, nor his attorney, endeavored to follow the suggestion of the representative at Galveston nor did they refer the dispute to the union agent in Baltimore or to the National offices of the N.M.U. in nearby New York

[16] Section 2 of Article II (p. 43a) provides in part as follows: "Such complaints shall be settled through the grievance machinery of this agreement at the port where the Shipping Articles are closed, or at a continental American port where the company maintains an operating office and the Union maintains an agent. In the event that the company maintains an operating office in an outside port but does not have a representative qualified to interpret debatable points in the agreement, it is agreed by the union that the company shall reserve the right to refer such disputes to their head office for final settlement. It is agreed by the Company that reasonable effort will be made to settle such disputes in the outside ports before referring same to the head office; however, if such dispute cannot be settled in this matter then the entire controversy shall be referred to the national office of the Union and the head office of the Company for disposition. In the event that agreement cannot then be reached between the Company and the national office of the Union, the dispute shall then be disposed of as provided in Article XII."

City. Had the matter been referred to the New York headquarters of the Union, a convenient locale for reference of the matter by the appropriate union official to the petitioner at its principal office, 17 Battery Place, New York City, in depth consideration and probable resolution of the problem may have been effected without delay. Instead the respondent, with the assistance of his attorney, chose to start suit in the U.S. District Court.

The respondent has selected 46 U.S.C. § 596 as his vehicle for redress. That statutory provision was enacted in its original form in the late 18th Century, and in its own fashion, was a pioneer of sorts in the field of labor-management relations.[17] Its apparent design has been continued through the years with the latest modification having been enacted by the Congress on March 4, 1915.[18] Since that time, the passing decades have witnessed the emergence of the American labor unions as powerful advocates and guardians of the rights of the American worker, both ashore and afloat. The enactment of the Labor-Management Relations Act of June 23, 1947,[19] coupled with the growing sophistication of present day labor-management relations, have in a large measure, supplanted the basic purpose for the initial enactment of 46 U.S.C. § 596 and now supply a more practical means for the settlement of disputed wage claims.

Respondent's employment and that of his fellow seamen aboard U.S. flag merchant vessels is subject to detailed and all inclusive working agreements negotiated by their unions which include provisions for the resolution of the

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[17] An Act of the United States Congress of July 20, 1790, C. 29, Sec. 6, 1 Stat. 133.

[18] An Act of Congress of December 21, 1898, C. 28, Sec. 4, 26, 30 Stat. 756, 764 and put in its present form by an Act of Congress of March 4, 1915, C. 153, Sec. 3, 38 Stat. 1164.

[19] 29 U.S.C., Sec. 141, *et seq.*

day to day disputes that may arise in the course of said employment. Such contracts are most emphatic with reference to wages, overtime compensation and related benefits. It is the purpose of the agreement to establish the rights of the union members and at the same time provide a means for swift, adequate relief to those aggrieved by its breach. The grievance and arbitration procedures provided for in such contracts have proved to be most successful in accomplishing the desired result with minimum disruption of the relationship between the parties. In consideration of the recognition and adherence to the grievance machinery and arbitration clauses set forth in the NMU agreement, the parties have pledged not to strike on one hand and not to engage in a lock-out on the other hand in the context of the ordinary industrial usage.[20] The peaceful settlement of disputes arising out of the application or interpretation of Collective Bargaining Agreements was the stated objective of Congress at the time of its enactment of the Labor-Management Relations Act, 1947, § 203(d).[21]

The stated intention of Congress has been defined, reaffirmed, and applied, in a number of decisions of the Court: *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 77 S.Ct. 912, 1 L. Ed. 2d 972 (1957); *United Steel Workers of America* v. *American Manufacturing Company*, 363 U.S. 564, 4 L. Ed. 2d 1403, 80 S.Ct. 1343 (1960); *United Steel Workers of America* v.

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[20] Joint Exhibit No. 1, Article I, Secs. 2 and 3.

[21] As 29 U.S.C. 173(d) provides:

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. The Service is directed to make its concilation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases."

Warrior and Gulf Navigation Company, 363 U.S. 574, 80 S.Ct. 1347, 4 L. Ed. 2d 1409 (1960); *United Steelworkers of America* v. *Enterprise Wheel and Car Corporation,* 363 U.S. 593, 80 S.Ct. 1358, 4 L. Ed. 2d 1424 (1960); *Republic Steel Corporation* v. *Charlie Maddox,* 379 U.S. 650, 13 L. Ed. 2d 580, 85 S.Ct. 614 (1965); *Manuel Vaca, et al.* v. *Niles Sipes, et al.,* 386 U.S. 171, 87 S.Ct. 903, 17 L. Ed. 2d 842 (1967), and more recently *The Boys Market Inc.* v. *Retail Clerks Union, Local 770,* (decided June 1, 1970) — U.S. — 26 L. Ed. 2d 199, 90 S.Ct. —. Each of these cases dealt with disputes of varying nature involving the interpretation or application of the relevant provisions of the particular labor contract. The Court clearly expressed its views on the subject in *United Steelworkers of America* v. *American Manufacturing Company, supra,* at page 567 of the U.S. Report:

> "The collective agreement calls for the submission of grievances in the categories which it describes, irrespective of whether a court may deem them to be meritorious. In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve (citations omitted). The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.
>
> The courts, therefore, have no business weighing the merits of the grievance, considering whether there is particular language in the written instru-

ment which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware."

In a companion decision, *United Steelworkers of America* v. *Warrior and Gulf Navigation Company, supra,* the Court at page 578 of the U.S. Report, ascribed to the Collective Bargaining Agreement the characteristic of a "generalized code" designed to govern the many disputes which may arise during the day to day activities indigenous to the particular industry, and "called into being a new common law—the common law of a particular industry or of a particular plant". The resolution of the problems thus presented would best be left to those fully familiar with the characteristics of the industry and the problems that may arise, coupled with the necessary experience to provide a practical solution.

Had the respondent seen fit, in person, or through the offices of his attorney, to refer his problem to NMU National Headquarters office in New York, undoubtedly, the dispute would have been resolved with dispatch. Instead, he chose the long, drawn out, and technical procedure of civil litigation, in an effort to find a solution to his problem. This does not meet with the declared intention of the Congress as expressly stated in the Labor-Management Relations Act § 203(d),[22] and, in truth, frustrates the original purpose for the enactment of 46 U.S.C. § 596 and its predecessor legislation. The protection of the interests of the employee will best be served by the grievance machinery and arbitration procedures, if need arise, as so carefully spelled out in the Collective Bargaining Agreement. When the petitioners disputed the respondent's claim for overtime earnings on the basis of the applicable provisions of

[22] 29 U.S.C. 173(d) *supra.*

the union contract relating to the nature of the work performed and circumstances of the so-called "restriction to ship", it made a decision that it was entitled to make. The respondent, or his attorney, were then obligated to refer the matter to the responsible union representative and request effective resolution, which was not done.

The Congress intended that the use of the grievance and arbitration procedures be enforced and provided a means for doing so in § 301(a) of the Labor-Management Relations Act.[23] Jurisdiction was conferred upon the U. S. District Court to entertain a cause of action, regardless of amount in controversy or the citizenship of the parties, for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. The application of said statute for the purpose of promoting and enforcing the use of a grievance arbitration provision in a collective bargaining agreement was discussed at length in the Court's decision in *Textile Workers Union* v. *Lincoln Mills, supra,* then followed and amplified in the later decisions comprising the Steelworkers Trilogy,[24] *Republic Steel* v. *Maddox, supra; Vaca* v. *Sipes, supra*; and *The Boys Market* v. *Retail Clerk's Union, supra.* This concept has been applied to individual wage claims as in the *Maddox* case, *supra,* and was not affected by the fact that the employee/employer relationship had

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[23] As 29 U.S.C. 185(a) provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

[24] *United Steelworkers of America* v. *American Manufacturing Company, supra; United Steelworkers of America* v. *Warrior and Gulf Navigation Company, supra;* and *United Steelworkers of America* v. *Enterprise Wheel and Car Corp., supra.*

been terminated. Nor is the employee barred from suing his employer, and if need be, his union in the appropriate case because the disgruntled worker may show that his effort to utilize the grievance arbitration procedure was frustrated by bad faith, or such arbitrary action on the part of his union as to amount to a breach of the duty of fair representation. The Court in *Vaca* v. *Sipes, supra,* dealt with that problem and ruled that the employee must give his union a fair chance to act in his behalf before legal action could be justified. In the present case neither the respondent nor his counsel endeavored to place his claim squarely and firmly before the responsible union representative for action.

In the maritime industry, it is most important that the seaman have recourse to his union for assistance with problems arising out of the application and interpretation of the union agreement. By the very nature of the work a seaman may serve on a number of vessels owned or operated by different and unrelated employers during the course of any given year. Thus, the most enduring connection such an employee will have is the one with his union. It is reasonable therefore that he look to his union in the first instance for assistance, and that he be required to do so is of equal importance to his employer. The transitory nature of the employment requires that the shipowner have a stable and readily available entity to work with in the resolution of disputes that may arise. Frequently the seaman is away on a voyage and not readily accessible to discuss settlement of his problem. Thus the union serves a dual function. It is the spokesman for its members and provides an accessible forum for disposition of disputes for the employer. In this, of all industries, the preservation and enforcement of the use of the grievance and arbitration procedures as contained in the Collective Bargaining Agreement is most essential.

The further reason for maintaining an atmosphere of cooperation between the maritime unions and the ship operator lies in the fact that the employer's source of maritime personnel is the union hiring hall. Each organization is dependent on the other to fulfill its allotted function in a vessel's operation. After a crew is signed on a vessel, and the vessel puts to sea, there is a member of the union who occupies the position of union delegate and spokesman for his fellow crew members while on board the vessel, in the day to day dealing with the management representative embodied in the person of the captain of the ship. That union delegate performs duties similar to that of a shop steward in a shore based operation. If full cooperation cannot be achieved between the union delegate and the ship's master, the effective inner working of the vessel and the successful completion of her projected voyage will in all likelihood be affected.

The lower courts have applied the relevant provisions of the Labor-Management Relations Act, 1947, and have followed the lead of this Court in enforcing the use of the grievance and arbitration procedures as provided for in the Collective Bargaining Agreement, in matters involving merchant seaman. See *Albert E. Brandt* v. *United States Lines Company, Inc.,* and *National Maritime Union,* 246 F.S. 982; (SDNY 1964) *Alvin Freedman* v. *National Maritime Union of America AFL-CIO* and *American Export Isbrandtsen Lines, Inc.,* 347 F.2d 167 (2 Cir. 1965) cert. denied. 383 U.S. 917 (1966); *Kenneth Jones* v. *American Export Isbrandtsen Lines, Inc.,* 285 F.S. 345 (SDNY 1968). In the *Freedman* and *Brandt* cases, *supra,* the claims presented by the seamen were for alleged wrongful discharge by the employer and purported failure on the part of the National Maritime Union to prosecute its members claim for reinstatement and damages. In each case, the Court ruled that the union had acted properly. It had conducted a thorough investigation of the grievance and

the District Court granted summary judgment dismissing the cause of action.

The *Jones* case, *supra,* was strikingly similar to the respondent's suit herein, in that it involved transportation expenses, overtime compensation, wrongful dismissal, payoff procedures, and penalty wages. The defense of failure to exhaust union grievance procedures with respect to overtime pay, transportation costs, wrongful discharge and the claim for penalty wages asserted pursuant to 46 U.S.C. § 596 were considered by the Court. It was determined that Articles II and XII of the working agreement [25] were not pursued by the plaintiff despite the seaman's contention that following the payoff he brought his grievance concerning overtime to the attention of the union patrolman. He further claimed that the grievance was not prosecuted "effectively" by the union and that he was subjected to a "run around".[26] The District Court cited with approval this Court's decision as enunciated in *Vaca* v. *Sipes, supra,* and ruled that in absence of a showing of bad faith on the union's part in not processing the seaman's alleged grievance, the steamship company did not act arbitrarily or unreasonably in failing to pay the wages claimed by the seaman. The defendant was not charged with deliberate failure to act equitably under all of the circumstances. Accordingly, the claims for unpaid overtime compensation and penalties made pursuant to 46 U.S.C. 596 were disallowed.

The Circuit Court in the majority opinion below suggested that:

> "The collective bargaining grievance procedure available to any seaman who is a union member to collect sums allegedly due him from his employer

[25] The same as Joint Exhibit No. 1 in this case.

[26] *Kenneth Jones* v. *American Export Isbrandtsen Lines, Inc., supra,* at p. 350.

> is an additional mode of redress for such seaman and which he may pursue at his election. However, such procedure is of fairly recent vintage, having matured in viable form in the period when labor was making substantial gains on the economic front" (p. 68a).

It appears that the Circuit Court perhaps agreed that the intention of Congress as expressed in The Labor-Management Relations Act of 1947, and that the pronouncements of this Court were sound for shoreside industry, but perhaps would not afford adequate protection of merchant seamen. The long history of 46 U.S.C. 596, and that of its predecessors plus "considerations of public policy" were cited as the apparent reasons for its ruling.

In the interest of even-handed justice, the shipowner/employer having entered into an agreement with the collective bargaining representative of the seamen employed aboard its vessel should be entitled to rely on that general body of "federal law" developed with appropriate regard for the national labor policy as represented by the enactment of Congress and the rulings of this Court. That policy in its application is designed to implement the use of grievance machinery and the arbitration procedures as agreed to by the parties at the bargaining table for the avowed intention of peaceful settlement of disputes arising within the day to day workings of the industry. The considerations of public policy are not nullified or circumvented by private agreement, as suggested in the majority opinion in the Circuit Court (p. 69a), by the use of grievance arbitration procedure to settle claims arising out of the provisions of the union contract. Instead, it is the public policy that is being served by encouraging the working man to look to his appointed representative to carry his brief to his employer to recover that which the working man believes to be rightfully his. In what manner is a seaman benefited, if he is required to hire an attorney to

resolve a disputed wage claim by means of an expensive legal proceeding? His union is better equipped to assist him and will do so without charge. It must be allowed to fulfill that allotted function for its members.

POINT II

The expressed policy of the National Labor Laws of the United States should not be made subordinate to the traditional adoption of merchant seamen as wards of the Admiralty where common objectives are sought.

The majority opinion of the Court below was based on three propositions:

1. Section 596 of Title 46 "antidated by long years the grievance procedure provided in the union contract". (p. 68a)
2. "Seamen have been accorded special protection by their government and Courts," and are treated as wards of the Admiralty in the "scheme of things judicial". (p. 65a)
3. "Statutes enacted out of consideration for public policy, such as Section 596 . . . should not and cannot be nullified or circumvented by private agreement". (pp. 68a-69a)

In his dissent to the majority ruling, Chief Judge Haynsworth brought the matter into its modern perspective when he stated:

> "I think the purpose of the statute unthwarted and the protection of seamen undiminished by enforcement of the contract's requirement of arbitration in which the seaman is represented by a union representative, skilled in the interpretation of the

collective bargaining agreement upon which the claim is based.

The statute upon which the plaintiff relies has a long history. Its forerunners were enacted at a time when there was a not uncommon practice of discharging seamen in a foreign port without any money, rendering them easy prey to a shipowner desiring a lower wage scale. There were in those days no collective bargaining agreements to mitigate the harshness of the seaman's working condition or to lend him protection at the time of discharge. The statute protected seamen 'from the harsh consequences of arbitrary and unscrupulous action of their employers to which, as a class, they are peculiarly exposed'." (pp. 69a-70a)

It appeared to trouble the majority below that the requirement that the seaman pursue his claimed overtime compensation by use of the contract grievance machinery would in some fashion undermine the traditional protected status afforded the maritime worker. That view failed to recognize certain developments that have taken place in the maritime industry during the last fifty years. The right to overtime pay is the exclusive creation of the Collective Bargaining Agreement. In this case, the respondent's claims are based on those provisions of the contract which call for such payment in the meritorious situation.

The American merchant seaman of this, the seventh decade of the twentieth century, is not the ingenuous individual described by Justice Story at the time of his ruling in *Harden* v. *Gordon* (C.C. Me. 1823) 11 Fed. Cas. 48 (No. 6047), or in *Brown* v. *Lull* (C.C. Mass. 1836) 4 Fed. Cas. 407 (No. 2018) wherein he described the seamen of that early time as "thoughtless," "credulous," "complying," "easily overreached," "with little foresight or caution," "rash," "improvident," "necessitous," "ignorant of the nature and extent of their own rights and privileges," "incapable of duly appreciating their value," "gallant," "extravagant," "profuse in expenditure," and "indifferent to the future."

Because of these characteristics it was deemed important to make those men wards of the court of Admiralty like "young heirs dealing with their expectancies." Thus, they were compared in their relationship with an unscrupulous over-reaching adult. While such comments were relevant in 1823 and reflected the climate in which that Act of the United States Congress of July 20, 1790, was conceived and enacted as the predecessor of Title 46 U.S.C. 596, we find them to be somewhat unrealistic 150 years later. Today, the American seaman has the advantage of the education supplied in the United States public schools. He has by dint of strike, hard-core bargaining and diligent negotiation become a mature segment of the American labor community. He is a member of a powerful labor union that zealously guards his rights at every turn. There is a union delegate on board each ship to represent his interests in his day to day working at sea. His present wage scale compares most favorably to that of his shore-side counterpart.[27] In addition, the seaman is supplied suitable food and lodging without charge and he has an employer funded pension and welfare plan, all of which are increments to his actual wages. Ships built and placed into service in the last decade are air-conditioned and are equipped with the latest mechanical advantages of our twentieth century technology. One merchant vessel at sea today uses atomic energy as its power source. No longer is the seafaring man subject to the whims of the wind on sail for his progress through the seaways. The perils of the sea, so frightening in yesteryear, have been largely overcome and vessels operate on regular schedules which are published well in advance of their calling at their assigned route of ports.

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[27] Based on respondent's pay aboard *SS Pecos* during 1965-1966 he earned approximately $600 per month inclusive of base wages plus overtime compensation (p. 33a-attachment 11).

That the American maritime unions are most important segments of our national labor scene cannot be denied. They are strong in membership and funds. They enjoy vigorous leadership. They are affiliated with the AFL-CIO and they work in concert with the shipowner through the union operated hiring halls which generally supply the seamen for employment aboard American flag merchant vessels. The maritime unions representing unlicensed seamen work closely with those representing the licensed engineer officers, the Masters, deck officers, radio operators and pursers who, to a greater or lessor degree, make up the crew of modern ships.

The age of sail has given way to the age of the atom. The illiterate seaman of the early nineteenth century has evolved into an educated man, and by his self-determination, has elected to have his interests represented and protected by his union. The condition of his employment is controlled for the most part by the Collective Bargaining Agreement negotiated in his behalf by his union with his employer. The union enjoys a position of strength in the industry to the degree that there is little occasion for its members to seek the aid of the courts to enforce the rights created by the Collective Bargaining Agreement. Disputes that may arise between the seaman/employee and his shipowner/employer are capable of expeditious resolution by the men fully familiar with the nature of the calling and its requirements. The guidelines set forth in the contract supply the procedure to be followed to reach such a settlement without resort to the courts.

Title 46, U.S.C., Sec. 596, originally sought to accomplish the objective for which the grievance and arbitration procedures are now utilized. The enforcement of the prompt payment of earnings will actually be accomplished without expense to the seaman. The nature of maritime employment in and of itself calls for an efficient, speedy settlement of disputed wage claims. By referring the matter directly

to the union representative, a preliminary ruling on the validity of the claim may be obtained initially and the matter then presented to the employer in its proper posture for settlement. If agreement cannot be reached, then it will be referred to arbitration for final disposition. A more effective means for accomplishing that purpose of public policy which led to the enactment of Section 596 is at hand. To use that procedure will not nullify or circumvent the desired objective. The protection of seamen will not be diminished, instead the protection intended to be afforded by the statute will be reinforced and strengthened by use of the grievance arbitration procedures.

In the shipping industry today, contract wage claims represent but one type of problem to be resolved between labor and management, and the promotion of the use of the means selected by the parties to settle their differences appears to be the desired objective and that which conforms to the expressed policy of the national labor laws of the United States.

POINT III

The U. S. District Court was correct in granting summary judgment in favor of the petitioner.

In granting summary judgment in favor of the petitioner the District Court did not rule on the merits of the respondent's claims (p. 55a). It found as matters of undisputed fact that grievance machinery was contained in the N.M.U. agreement; that the dispute arose under the terms of the union agreement; and that the respondent did not take proper and sufficient steps to process his grievance. Based on the decisions of this Court in *Republic Steel* v. *Maddox, supra,* and *Vaca* v. *Sipes, supra,* it was determined that the national labor policy, as described in said cases, compelled the respondent to pursue his claims

in accordance with the contract procedures. The majority in the Court below did not agree, and stated that the ruling of the District Court was "tantamount to a ruling that the Court lacked jurisdiction" (p. 64a). Such was not the case. The Court exercised its jurisdiction and ruled that the respondent must proceed within the framework of his union agreement established for the purpose of resolving his claim. That direction was in accordance with the dictates of the Labor-Management Relations Act, 1947, and the numerous decisions of the Court previously discussed in this brief. The utilization of the summary judgment procedure was considered the appropriate means of resolving lawsuits wherein "no genuine issue as to any material fact was presented touching upon the question of the propriety of arbitration." *H. K. Porter Company, Inc., Connors Division, W. Va. Works, et al.* v. *United Steelworkers of America, et al.*, 400 F.2d 691, 695 (4 Cir. 1968). See also *Cornelius O'Sullivan* v. *Getty Oil Company*, 296 F.S. 272 (U.S.D.C. Mass., 1969). The same result was reached in cases arising under the NMU Agreement. *Brandt* v. *United States Lines Co. and the National Maritime Union, supra*, and *Freedman* v. *National Maritime Union and American Export Isbrandtsen Lines, Inc., supra.*

In effect what the courts have done is to apply a doctrine of "abstention". That practice has been provided for in Section 203(d) of the Labor Management Relations Act, 1947 [28] and followed in *Republic Steel* v. *Maddox, supra* and *Vaca* v. *Sipes, supra.* The doctrine of abstention is not unknown to the law and was applied by this court in *Railroad Commission of Texas* v. *Pullman Company*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) and by the U. S. District Court of Washington in *Jehovah's Witnesses of the State of Washington, et al.* v. *King County Hospital Unit No. 1, et al.*, 278 F.S. 488 W.D.W.N.D. 1967). The effect is

[28] 29 U.S.C. 173(d), *supra.*

to have the court defer, in the first instance, to another tribunal for the determination of the rights of the litigants wherein adequate relief was there available by use of another procedure capable of resolving the dispute. This may be true whether dealing with State Court procedures, administrative procedures or arbitration pursuant to contract. The application of that doctrine does not deprive the court of jurisdiction. It merely permits the use of other means to determine the rights of the parties. The Common Law of the contract as described in *United Steelworkers, et al.* v. *Warrior and Gulf Navigation, et al., supra,* will provide adequate and effective relief for the resolution of contract disputes and the Court need not become involved. Therefore, the action of the U. S. District Court in granting summary judgment in favor of the petitioner was correct and in conformity with the development of Federal Labor Contract Law and National Labor policy of the United States.[29]

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below be reversed.

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[29] *The Boys Market, Inc.* v. *Retail Clerk's Union, Local 770, supra,* at p. 205 of the 26 L. Ed. 2d report.